United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

75-4132

United States Court of Appeals

For the Second Circuit

No. 75-4132

WESTERN UNION INTERNATIONAL, INC.,
Petitioner,

—against—

THE FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents,

—and—

THE WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII and ITT WORLD COMMUNICATIONS INC.,
Intervenors.

PETITION FOR REVIEW OF A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONER WESTERN UNION INTERNATIONAL, INC.

STROOCK & STROOCK & LAVAN
Attorneys for Petitioner
WESTERN UNION INTERNATIONAL, INC.
61 Broadway
New York, New York 10006
(212) 425-5200

Of Counsel:
ALVIN K. HELLERSTEIN
HENRY J. SILBERBERG
ALAN KOLOD
—and—
ROBERT E. CONN
ROGER P. NEWELL
Western Union International, Inc.
One WUI Plaza
New York, New York
(212) 363-6404

Table of Contents

Table of Authorities

I. Cases

II. Statutes

III. Legislative Materials

A. Reports

B. Hearings

PAGE

IV. Other Authorities

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-4132

WESTERN UNION INTERNATIONAL, INC.
Petitioner,

—against—

THE FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents,

—and—

THE WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII AND ITT WORLD COMMUNICATIONS INC.,
Intervenors.

REPLY BRIEF FOR PETITIONER WESTERN UNION INTERNATIONAL, INC.

We demonstrated in our main brief (a) that for over 30 years there has been a consistent line of authority, developed and subscribed to by Congress, the Courts, the FCC, and the telecommunications industry (including WUTelCo) interpreting Section 222 of the Communications Act as permanently excluding WUTelCo from international telegraph operations, and (b) that the FCC now improperly seeks to depart from that line of authority.*

* The abbreviations which are used herein are the same as those contained in WUI's main brief.

In this reply brief we show the lack of merit to the arguments advanced by the FCC, WUTelCo and the State of Hawaii.

I.

Consideration of the Legislative History of Section 222 Is Essential for the Statute to be Properly Construed.

The FCC Order explicitly recognized that "[t]he divestment clause in the present Section 222 cannot be read in isolation" (A35) and that "[i]n construing the divestment clause we must look to the intent of Congress in including it and effectuate that intent" (A18). The FCC's argument to this Court contradicts the FCC Order. The FCC and WUTelCo now argue that legislative history should be ignored in interpreting Section 222 because, they say, the single phrase "theretofore carried on" in Section 222(c)(2) has a clear, unambiguous meaning, and is decisionally significant to the exclusion of the remainder of Section 222. We disagree.

The legislative history is basic to an understanding of Section 222, and the literal language is not so clear that the legislative history can be ignored. As Judge Learned Hand so wisely said "[t]here is no surer way to misread any document than to read it literally." *Guiseppi* v. *Walling,* 144 F.2d 608, 624 (2d Cir. 1944) (concurring opinion), *aff'd sub. nom. Gemsco, Inc.* v. *Walling,* 324 U.S. 244 (1945). This Court repeatedly has followed that philosophy. In *Borella* v. *Borden Co.,* 145 F.2d 63, 64-65 (2d Cir. 1945), *aff'd,* 325 U.S. 679 (1945), Judge Learned Hand, speaking for the Court, determined that whatever the shortcomings of resorting to legislative history, they are far less than those which arise from an overly literal reading of a statute.

> ". . . [L]egislators, like others concerned with ordinary affairs, do not deal in rigid symbols, so far as possible stripped of suggestion, and do not expect their words to be made the starting point for a dialectical progression. We can best reach the meaning here, as always, by recourse to the underlying purpose, and with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time. To say that that is a hazardous process is indeed a truism, but we cannot escape it, once we abandon literal interpretation—a method far more unreliable."

Stated somewhat differently, the " 'plain meaning' approach has long since ceased to have this court's adherence." *Federal Maritime Commission* v. *DeSmedt,* 366 F.2d 464, 469 (2d Cir. 1966), *cert. denied,* 385 U.S. 974 (1966).*

The legislative history of Section 222 conclusively rebuts WUTelCo's argument (at page 14 of its brief) that Congress "deliberately" chose not to prohibit WUTelCo from future international competition and that Congress "chose instead to leave the matter of future international operation to the sound discretion" of the FCC. The legislative history clearly shows that:

---

* The holdings in the Supreme Court are the same; e.g., see *Lynch* v. *Overholser,* 369 U.S. 705, 710 (1962):

> "The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute . . . for 'literalness may strangle meaning.' "

See also, Boys Markets, Inc. v. *Retail Clerk's Union Local 770,* 398 U.S. 235, 250 (1970); *Immigration and Naturalization Service* v. *Errico,* 385 U.S. 214, 217 (1966); *Pope* v. *Atlantic Coast Line R. Co.,* 345 U.S. 379, 392 (1953) (concurring opinion, Frankfurter, J.); *United States* v. *American Trucking Associations, Inc.,* 310 U.S. 534, 542-43 (1940); *Schwartz* v. *Romnes,* 495 F.2d 844, 848-49 (2d Cir. 1974).

(a) Section 222, prior to enactment, was several times revised in order explicitly to remove all jurisdiction from the FCC concerning whether WUTelCo had to get out of the international telegraph business. See WUI brief, pp. 15-18.

(b) Congress, after years of study and debate, intended Section 222 as ongoing legislation designed to deal with telegraph operations which were in existence in 1943 *and* which would come into being as a result of technological change. Congress, for example, decided that it was in the public interest for WUTelCo to be permitted, not only to merge with Postal Telegraph, but also, shielded from the antitrust laws, subsequently to acquire the TWX network from AT&T and to obtain a domestic telegraph monopoly. In exchange, WUTelCo had to retire permanently from the international telegraph business.* See WUI brief, pp. 24-27.

(c) Congress determined in passing Section 222, prompted by the FCC's recommendations, that the FCC could not effectively regulate against WUTelCo's discriminating in favor of its own international telegraph operations and against those of the international carriers. See WUI brief, pp. 18-22.

It is not in the interest of sound judicial policy to hazard an interpretation of Section 222 without regard for the above legislative history.

---

* The FCC, by its silence, seemingly concedes the ongoing effect of Section 222. WUTelCo unconvincingly attempts to explain it away. While arguing that the statute should be literally read, WUTelCo inconsistently contends that the phrase "telegraph operations" has a restrictive meaning when used in subdivision (c)(2) of Section 222 (the divestment provision), but a more expansive meaning when used in subdivision (b)(1) of Section 222 (the provision permitting WUTelCo to acquire A.T.&T.'s domestic TWX and leased wire operations). See WUTelCo brief, pp. 25-26, fn. 17. There is no logic to WUTelCo's contentions, either from a literal reading of the statute or otherwise.

Morover, to the extent ambiguity may be necessary in order for the Court to consider the statute's legislative history, such ambiguity clearly is present here. Contrary to the FCC's contention (FCC corrected brief, p. 18), the question of whether Section 222 is an ambiguous statute cannot end with the "before then" dictionary definition of "theretofore."* At a minimum, one must further inquire as to what point in time the word "theretofore" relates. As used in Section 222(c)(2), the words "theretofore carried on," when literally read, can give rise to at least three possible interpretations: that any party to a consolidation or merger authorized by the statute must divest its international telegraph operations which it "carried on" (1) prior to the divestment; (2) prior to the consolidation or merger; or (3) prior to 1943, the date Section 222 became law.

At the time of WUTelCo's divestment in 1963, everyone concerned (particularly the FCC and WUTelCo) applied the first of the above-noted possible interpretations.** WUTelCo thereby was prohibited from providing significant post-1943 developed international telegraph services, such as telex and data services and services which now are provided via satellite.***

Moreover, in *Commercial Cable Company,* 28 F.C.C. 283 (1960), in granting a WUTelCo application to add to its existing international cable system in order to better provide "nonmessage telegraph service (telex and leased channel services)," the FCC explicitly recognized that these "new" facilities would be subject to the divestment require-

* In pertinent part, the statute reads: "Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger." 47 U.S.C. § 222(c)(2).

** For example in 1962, WUTelCo's Vice President of Planning conceded in testimony before Congress that Section 222 forbade WUTelCo from engaging in international satellite operations which WUTelCo did not have in 1943. See WUI brief, pp. 40-43.

*** See discussion *infra* at p. 9.

ment of Section 222.* Additionally, the legislative history of the phrase "theretofore carried on" evinces a legislative intent for a permanent divestment. Earlier legislation would have permitted separate merged carriers for domestic and international telegraph operations, with each monopoly obligated to divest operations in the other's sphere "theretofore carried on." Anything less than a complete and permanent bar to re-entry would have been contrary to this statutory scheme. Although the international merger provision was not enacted, the phrase "theretofore carried on" retained its originally intended meaning. See WUI brief, pp. 22-23.

Now, however, for the purpose of this case, the FCC and WUTelCo would like the phrase "theretofore carried on" to mean "carried on before 1943." It is hard to understand why Section 222 should have a different meaning now than it did in those earlier years. And, in other portions of its decision, the FCC agrees with us, for it concedes that WUTelCo should not be permitted to re-enter those fields of international telegraph operations which WUTelCo divested in 1963 (and which did not exist in 1943) because, in the FCC's words, any other conclusion would be "meaningless and absurd." (A46)**

WUTelCo contends that its own conduct and the conduct of the FCC and of Congress during the 20 years between the enactment of Section 222 and WUTelCo's divestment of its

* WUTelCo entered the international telex market in 1960. Both the FCC and WUI (the divestee) relied heavily upon the potential growth of this new service to assure WUI's viability. *Western Union Divestment,* 30 F.C.C. 323, 361-62 (1961). Likewise, based upon representations supported by the legal opinions of WUTelCo's top legal officer and its special outside counsel, the investing public also had reason to assume that the divestee (WUI) would be able to operate WUTelCo's international telex service free from any subsequent WUTelCo re-entry. See Western Union International, Inc. Prospectus, dated September 23, 1963, pp. 4, 18, 35.

** Thus, even the FCC would not agree with WUTelCo's simplistic theory that Section 222 required nothing more than divestiture, and did not preclude immediate re-entry thereafter into any and all international services. See WUTelCo brief. pp. 13-14.

international telegraph operations, particularly the history concerning WUTelCo's repeated, but unsuccessful, efforts at getting the divestment requirement repealed, is irrelevant to the issue before this Court. See WUTelCo brief, pp. 26-27. It would be anomalous, to say the least, for this Court to ignore the extensive and repeated post-1943 deliberations of Congress, the FCC Commissioners and leading officers of the major telegraph carriers in the country. Indeed, the FCC itself has utilized the technique of gleaning legislative intent from such post-legislative activity. *Domestic Communications—Satellite Facilities,* 22 F.C.C. 2d 86, 132-33 (1970). *See also North Carolina Utilities Commission* v. *FCC,* Docket No. 74-1220, slip opinion at p. 21 (4th Cir. April 14, 1976) (holding that "Congress cannot have been unaware" of a 30 year course of action by the FCC).*

The argument of the FCC and WUTelCo is confused, and the literal meaning of the statutory phrase in question is uncertain, making the legislative history essential as a guide for the statute's proper interpretation.

In sum, Section 222 presents a complex statutory scheme, and it is not an unambiguous, simple provision to which the "plain or ordinary meaning" rule can be applied, to the exclusion of more than 30 years of unequivocal pre- and post-legislative history.

II

Congress Did Not Delegate Authority to the FCC to Authorize WUTelCo to Resume International Operations.

As previously noted (*supra* at pp. 3-4), the legislative history of Section 222 shows the clear intent of Congress not to delegate to the FCC any discretion in determining

* The matter appears analogous to contract law where courts frequently give great weight to the practical interpretation of a contract made by the parties after the contract's execution. *See, e.g.,* 4 *Williston on Contracts* § 623 (3rd ed. 1961); 3 *Corbin Contracts* § 558 (1960).

whether WUTelCo should divest its international telegraph operations. Accordingly, it is illogical to conclude, as the FCC Order nonetheless does, that Congress intended the FCC, under Section 214 or any other general statutory provision, to have any discretion about whether WUTelCo could resume international telegraph operations.*

It also should be noted that when Section 222 was enacted, Section 214 was amended so as to exempt acquisitions made pursuant to Section 222 from the discretionary power of the FCC granted in Section 214, by providing that no Section 214 certificate of "public convenience and necessity" shall be required for the construction, acquisition or operation of any communications line acquired under Section 222. 47 U.S.C. § 214(a). Section 222, not 214, is the governing authority for WUTelCo to acquire additional domestic telegraph operations. *Western Union Telegraph Co.*, 24 F.C.C. 2d 664 (1970). Likewise, Section 222 controls international re-entry by WUTelCo, and Section 214 does

* From the suggestion in its brief (at p. 19, fn. 15) that WUI has improperly attempted to invoke the doctrine of *expressio unius est exclusio alterius,* it is apparent that WUTelCo misunderstands this point. It is not WUI's contention that because Section 222 specifically gave the FCC discretion over the time by which WUTelCo had to divest and other particular matters that the FCC lacks discretion over all other matters dealing with Section 222. Rather, WUI's point is that the various changes which the statute underwent in the drafting process show the intention of Congress in specifically making sure that it was not leaving to the FCC any discretion in determining whether there was a need for WUTelCo to get out of the international telegraph business. Congress conclusively decided that WUTelCo must get out, and therefore, the issue here is whether, in the light of that firm Congressional resolution, Congress nonetheless intended the FCC subsequently to have discretion in authorizing WUTelCo's re-entry into international telegraph operations. We say that there is no logic in holding that Congress first mandated that WUTelCo divest its international operations and then gave the FCC discretion to decide whether or not WUTelCo could resume international operations. If Congress had wished to give the FCC jurisdiction concerning a re-entry of WUTelCo to engage in international telegraph operations, it would have given the FCC discretion as to the divestment of such operations as well.

not permit the FCC to do that which it cannot do under Section 222.

Indeed, the FCC, in *Telegraph Service with Hawaii,* 28 F.C.C. 599, *aff'd on reconsideration,* 29 F.C.C. 714 (1960), explicitly recognized that by enacting Section 222, Congress "withdrew" the FCC's power under Section 214 to authorize any international telegraph operations by WUTelCo.

> "Under these circumstances it [Congress] in effect withdrew our power under section 214 to authorize overseas service by Western Union [WUTelCo] as part of its domestic operations even if we believe such service to be required by the public convenience and necessity." 29 F.C.C. at 715.

The FCC thus squarely held that if the public interest requires that WUTelCo be permitted to engage in international telegraph operations, "the remedy is to ask Congress to amend Section 222," not for the FCC "to misinterpret it." 28 F.C.C. at 605.*

Both the FCC and WUTelCo attempt to distinguish *Telegraph Service with Hawaii, supra,* on the ground that the holding therein "was limited to the particular service involved; namely public message traffic."** That decision, which the FCC's Common Carrier Bureau found dispositive of the issue in this case, cannot be that casually distinguished. WUTelCo there told the FCC, "that it [WUTelCo] plans to offer telegraph message, telex, leased facility, and money order services between the mainland and Hawaii," and the FCC then found that Section 222 prohibited WUTelCo from providing *all* of those international services, not just the proposed public message service. 28 F.C.C. at 609.

---

* Commissioner Charlotte T. Reid, although concurring with the FCC Order, favored such an approach. (A59-60). WUTelCo's different explanation of her opinion is unsupportable. (WUTelCo brief, p. 13, fn. 10).

** FCC corrected brief, p. 19; also see WUTelCo brief, p. 31, fn. 23.

The supporters of the FCC Order, relying upon such authorities as *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), also urge that the issue in this case turns upon the express and implied powers vested in the FCC by reason of Section 214 and the other statutory provisions from which the FCC derives its general powers. Again, they disregard both (a) the FCC's prior holding in *Telegraph Service with Hawaii, supra,* that Section 222 "withdrew" the FCC's authority under Section 214 to authorize WUTelCo to resume international telegraph operations, and (b) the consistent policy during more than 30 years following the 1943 enactment of Section 222 in furthering the objective of completely and permanently removing WUTelCo from international telegraph operations.

Notwithstanding the broad powers frequently delegated to administrative agencies, it still is well-settled that these agencies have only as much discretion as Congress gives them.

> "The rule making power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to carry into effect the will of Congress as expressed by the statute'." *Ernst & Ernst* v. *Hochfelder,* 44 U.S.L.W. 4451, 4460 (U.S. 1976).

They cannot employ their powers so as to circumvent a statutory scheme.

> "Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation." *American Telephone & Telegraph Co.* v. *FCC,* 487 F. 2d 865, 880 (2d Cir. 1973).

Additionally, it is an elementary rule of statutory construction that the specific statutory provision must be considered as controlling over the general. *E.g., Morton* v.

Mancari, 417 U.S. 535, 550-51 (1974); *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758 (1961); *Thielebeule* v. *M/S Nordsee Pilot,* 452 F.2d 1230, 1232 (2d Cir. 1971).

In this case, the FCC's discretion, as gleaned from the governing statute and its legislative history, is circumscribed, and it clearly does not extend to permitting WUTelCo to resume international telegraph operations.

III

The Same Potential for Abuse Exists with Regard to Mailgrams as for Other Telegrams if WUTelCo Is Permitted to Resume International Telegraph Operations.

The Congressional concern about the merged domestic carrier abusing its dominant position to the detriment of the international carriers is well-documented. As the FCC found in 1958, since the 1943 merger WUTelCo had been engaging in widespread, uncontrollable abuses by favoring its own international operations. *Western Union Telegraph Co.,* 25 F.C.C. 35, 58-71 (1958), *rev'd on other grounds, sub nom. Western Union Telegraph Co.* v. *United States,* 267 F.2d 715 (2d Cir. 1959). The abuses could be ended, the FCC found, only by the removal of WUTelCo from international operations. *See also, e.g., Hearings on S.3646 Before the Senate Commerce Committee,* 87th Cong., 2d Sess. 15 (1962). Yet, without the development of any new evidentiary record, it now is suggested that the abuses which generally occurred in the pick-up and delivery of telegrams will not occur with regard to mailgrams, allegedly because of such factors as a decline in over-the-counter and telephone methods of filing telegrams (WUTelCo brief, pp. 29-30), WUTelCo's self-serving statement that it "intends to compete fairly" (WUTelCo brief, p. 33 fn. 25), and the supposed insulating role of the U.S. Postal Service (Hawaii brief, p. 9). The argument is without merit.

It is clear that WUTelCo still possesses an enormous capacity for unfairly influencing the routing of international telegraph traffic. WUTelCo states that its recent monthly mailgram volume in the United States totals nearly 2 million messages and that almost 50% of its mailgram revenues are generated over-the-counter and by telephone. (WUTelCo brief, pp. 11, 30 fn. 21). In addition, according to a recent FCC decision, in 1974, the latest year for which statistics are available, WUTelCo handled 3 million unrouted telegraph messages for transfer to the international carriers. *International Record Carriers' Scope of Operations in the United States,* FCC 75-1430 (January 7, 1976).

Further, although conspicuously not mentioned by WUTelCo, it has a vast network of telex and TWX customers throughout the United States, estimated at about 100,000, to whom WUTelCo sends free messages touting the availability and urging the use of WUTelCo's telegraph services. The international carriers have no such free direct access to these potential mailgram customers throughout the United States. Thus, whether diminishing or not, WUTelCo still possesses an enormous potentiality to discriminate in its own favor with respect to international telegraph traffic emanating from the United States. If WUTelCo is permitted to engage in the international mailgram business, WUTelCo would be in a position to divert substantially the 3 million messages whose international carrier routings it now controls, as well as to divert mailgrams.*

* The FCC contends: "It is unreasonable to assume that WU [WUTelCo] would unilaterally change a telegraph message filed by a customer to a Mailgram since that would be a violation of the Communications Act." FCC corrected brief, p. 26. Suffice it to say that what the FCC now characterizes as an unreasonable assumption is similar to that which the FCC found to be a prevalent practice in the days before the divestment.

Moreover, it is apparent that, if permitted to resume international operations with a mailgram service, WUTelCo will intensify a pro-

In the absence of a Congressional amendment of Section 222, there was no basis for the FCC's treating mailgrams as a special category of telegraph communications and speculating, without factual findings, upon the potentiality for abuses "of the type that concerned Congress in enacting the investment clause." (A22).

IV

Mailgrams Are Indistinguishable from Other Telegrams.

Assuming *arguendo* that the FCC interpretation is correct and that WUTelCo may be permitted to engage in "new" international telegraph operations in which it did not engage in 1943, the FCC nonetheless erred in finding that mailgrams were a "new" service. The FCC finding is squarely at odds with the findings of the Court of Appeals for the District of Columbia in *United Telegraph Workers, AFL-CIO* v. *FCC*, 436 F.2d 920 (D.C. Cir. 1970). That Court, relying in turn upon the FCC's finding that mailgrams are "indistinguishable from other services now available on Western Union's [WUTelCo's] interstate network," found that "mailgram is not much of a step beyond the common and traditional practice of delivering copies of telegrams through the Mails." 436 F.2d at 923. See WUI brief, pp. 30-33.

As we have discussed previously, the acceptance, transmission, switching and facilities for mailgrams are sub-

---

gram, which it already has commenced, to frustrate the efforts of the international carriers to provide competing mailgram services, by opposing their applications to interconnect their overseas facilities with WUTelCo's monopoly domestic mailgram service, and meanwhile to attempt to get its own international mailgram services implemented. See Opposition to Petitions filed by WUTelCo in FCC File No. I-T-C-2618, dated November 3, 1975, and WUTelCo's application to provide mailgram service to Puerto Rico, filed in FCC File No. I-T-C-2618-1, dated March 1, 1976.

stantially the same as for other telegrams.* The fact that the Postal Service is delegated the responsibility of delivery hardly makes mailgrams a "new" telegraph service. The Postal Service merely is a delivery agent for WUTelCo. The contention expressed by the FCC that it lacks authority to regulate the Postal Service's performance of its responsibility is without merit. FCC corrected brief, pp. 21-22. The contention is refuted in *United Telegraph Workers, AFL-CIO* v. *FCC, supra* at 926-27. In addition, it is well-established that the FCC can fully regulate mailgram traffic through its authority over WUTelCo, just as the FCC regulates other telegram traffic which is delivered by postal agencies of foreign governments under arrangements made with the international carriers.**

The FCC itself provided the genesis for mailgrams, in its comprehensive *Domestic Telegraph Investigation* of 1962-1966, by recommending that the Post Office Department and WUTelCo study "the feasibility of utilizing rapid mail service for the *final delivery of telegrams.*" (Emphasis added).*** Thus, the history of mailgrams also demonstrates that they were intended as a form of telegram.

---

* In our main brief, we discussed the insignificance of most of the so-called distinctions betwen mailgrams and other telegrams upon which the FCC and WUTelCo rely. WUI brief, pp. 6, 32-33. In what appears to be an unrelenting effort, the answering briefs seek to find further distinctions by pointing to the fact that mailgrams may be filed on magnetic tape and by customers' business and computing machines. The answering briefs ignore mentioning, however, that other telegrams could be filed by such means. WUTelCo Tariff F.C.C. No. 240, pp. 7A (8th rev.), 29 (17th rev.) 41 (9th rev.).

***See, e.g., TRT Telecommunications Corp.*, 46 F.C.C. 2d 1042, 1055-56 (1974) (FCC regulation of foreign agency's share of joint revenues); *Communications Satellite Corporation*, 29 F.C.C. 2d 202 (1971) (FCC regulation of foreign agency's use of underseas cables and communications satellites jointly with U.S. carriers); *American Telephone & Telegraph Co.*, 13 F.C.C. 2d 235 (1968) (FCC regulation of foreign agency's rates for joint services).

*** *Report in the Domestic Telegraph Investigation*, FCC Docket No. 14650, p. 299 (April 29, 1966); *see also Western Union Telegraph Co., supra*, 24 F.C.C. 2d at 668.

Accordingly, if this Court decides that it must reach this subject, this Court should not defer to the FCC's finding on the "newness" of mailgrams and should reverse the FCC Order on the ground that the finding is an arbitrary one. Alternatively, at a minimum, the issue should be remanded for an evidentiary hearing so that it could be decided on a proper factual record.

V

The Other Arguments Advanced in Support of the FCC Order Are Extraneous to the Issue Before this Court.

A. Competitive Changes Within the Telecommunications Industry Cannot Change the Meaning of Section 222.

Both the FCC and WUTelCo say that competitive changes within the telecommunications industry since 1943, allegedly to WUTelCo's disadvantage, somehow support the finding that the FCC now has jurisdiction to permit WUTelCo to re-enter international telegraph operations. We know of no authority which supports this contention. Further, we note that similar competitive changes were brought to Congress' attention by WUTelCo in 1962 when it unsuccessfully sought repeal of the divestment requirement.

> "These technical developments have changed, and are continuing to change, the competitive situation and Western Union [WUTelCo] is today subject to competition in the domestic and international field [by A.T.&T.] that could not have been foreseen in 1943. . . . Permitting Western Union [WUTelCo] to engage in international, as well as the domestic communications field, will provide it with the op-

portunity to compete effectively with other communications operations." *S. Rep. No. 1982,* 87th Cong., 2d Sess. 6 (1962).*

In sum, these competitive changes, at best, warrant going back to Congress for a change in the statute.

B. The Recent Decision of the FCC to Expand the Number of Gateway Cities Is Irrelevant.

WUTelCo contends that the FCC is correct in lifting the Congessional ban against WUTelCo engaging in international telegraph operations because of a recent FCC ruling which permitted WUI, RCA and ITT to operate in the two cities which previously were the exclusive gateways of a fourth and substantially smaller international carrier, TRT Telecommunications Corporation ("TRT"), and permitted TRT to operate in the three gateway cities of the other three carriers. *International Record Carriers' Communications,* FCC 76-174 (February 26, 1976). WUTelCo also points to (i) applications pending by the international carriers asking the FCC to further increase the number of gateway cities, and (ii) the practice known as "paid direct access" by which the international carriers need not rely upon WUTelCo for pick-up and delivery to the non-gateway cities.**

WUTelCo's argument is without merit. Section 222, the same section expressing the Congressional will that WUTelCo should not engage in international telegraph operations, gave the FCC authority to expand, and contract, the number of gateway cities. The number of gate-

---

* Also see WUI brief, pp. 41-43.

** "Paid direct access" permits a customer in the hinterland to reach an international carrier in one of the gateway cities through WUTelCo's telex network or through the telephone system providing the customer is willing to incur the added expense of a telex charge or a toll call. Efforts by the international carriers to be permitted to absorb this added expense and thereby make the "direct access" concept more realistic consistently have been strongly opposed by WUTelCo and rejected by the FCC.

way cities, and the status of pending applications to expand that number, is irrelevant to the question of whether or not the FCC has discretion to permit WUTelCo to engage in international telegraph operations. If the FCC was wrong in exercising its authority over the expansion of the gateways, WUTelCo could have petitioned for review of that decision.*

C. WUTelCo's Analogy to Judicial Divestment Decrees in Antitrust Cases Is Inapposite.

WUTelCo argues that Section 222 should be strictly construed and claims support for that argument by an analogy to judicial divestment decrees in antitrust cases. WUTelCo's brief, pp. 14-15. Section 222 should not be construed either strictly or liberally but simply accurately. Moreover, even assuming *arguendo* that WUTelCo's analogy to judicial divestment decrees is apposite, that analogy would not support upholding the FCC Order. Since judicial divestment decrees in antitrust cases commonly provide that any future re-entry by the defendant would be permitted only subject to Court approval, it is consistent with that practice for Congress, not the FCC, to determine the propriety of WUTelCo's re-entry into international telegraph operations. It was Congress, not the FCC, that imposed the divestment requirement, and therefore only Congress can remove it.

D. Congress Has Determined that Hawaii Should Be Treated as an "International" Point Under the Communications Act, and Only New Legislation, Not the FCC or the Courts, Should Change that Determination.

The State of Hawaii has intervened in this proceeding in support of the FCC Order to argue that its citizens

---

* Rather than diminish any WUTelCo business, the decision in *International Record Carriers' Communications, supra* probably only will enhance competition among the international carriers. Significantly, WUTelCo did not take a position in the controversy.

should have the same access to WUTelCo's mailgram services as the citizens of other states.* This argument is purely one for Congress. So long as Section 222(a)(10) is on the books, this argument by the State of Hawaii is irrelevant in this forum.

---

* The three leading international telegraph carriers, including WUI, have had applications pending before the FCC since 1972 for authority to furnish to Hawaii (and to other "international" points) their equivalents of WUTelCo's mailgram service, but the FCC has not acted on such applications. See WUI brief, p. 6. Thus, it is not through any fault of the international carriers that the citizens of Hawaii have been denied this service.

It also is noteworthy that a comparison of WUI's and WUTelCo's amended applications to provide mailgram-type services to Hawaii reveals that WUI's proposed rates for the major classes of mailgram-type service are lower than those proposed by WUTelCo and lower than WUTelCo's domestic rates on the Mainland. Compare WUTelCo amended application, dated June 30, 1975, with WUI amended application, dated August 11, 1975, in FCC File No. I-T-C-2618.

CONCLUSION

The FCC Order should be reversed. The Order is inconsistent with both the legislative intent underlying Section 222 and prior judicial and administrative holdings which applied the statute, and the Order is arbitrary in its finding about the "newness" of mailgrams.

New York, New York
April 30, 1976

Respectfully submitted,

STROOCK & STROOCK & LAVAN
Attorneys for Petitioner Western Union International, Inc.
61 Broadway
New York, New York 10006
(212) 425-5200

Of Counsel:

ALVIN K. HELLERSTEIN
HENRY J. SILBERBERG
ALAN KOLOD
and
ROBERT E. CONN
ROGER P. NEWELL
Western Union International, Inc.
One WUI Plaza
New York, New York 10004
(212) 363-6404

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

-against-

THE FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

-and-

THE WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII, and ITT WORLD COMMUNICATIONS, INC.,

Intervenors.

Docket No. 75-4132

AFFIDAVIT OF SERVICE BY MAIL

- X

STATE OF NEW YORK)
(ss.:
COUNTY OF NEW YORK)

ANDREW J. TRUBIN, being duly sworn, deposes and says:

1. Deponent is over the age of 18 years and is employed in the offices of STROOCK & STROOCK & LAVAN, attorneys for Petitioner in the above captioned matter.

2. That on the 30th day of April, 1976, he served the within Reply Brief for Petitioner, Western Union International, Inc. on the parties set forth below:

on the parties set forth below:

MUDGE, ROSE, GUTHRIE & ALEXANDER
Attorneys for Intervenor, The
Western Union Telegraph Company
20 Broad Street
New York, New York 10005

LeBOEUF, LAMB, LEIBY & MacRAE
Attorneys for Intervenor, ITT
World Communications, Inc.
140 Broadway
New York, New York 10005

at the addresses designated by said attorneys or the parties by delivering a true copy of same to offices of said attorneys.

Andrew J. Trubin
Andrew J. Trubin

Sworn to before me this

30th day of April, 1976.

Henry J. Silberberg
Notary Public

HENRY J. SILBERBERG
Notary Public, State of New York
No. 3664710
Qualified in New York County
Commission Expires March 30, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

-against-

THE FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

-and-

THE WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII, and ITT WORLD COMMUNICATIONS, INC.,

Intervenors.

- X

Docket No. 75-4132

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
(ss.:
COUNTY OF NEW YORK)

ANDREW J. TRUBIN, being duly sworn, deposes and says:

1. Deponent is over the age of 18 years and is employed in the offices of STROOCK & STROOCK & LAVAN, attorneys for Petitioner in the above captioned matter.

2. That on the 30th day of April, 1976, he served the within Reply Brief for Petitioner, Western Union International, Inc.

ASHTON HARDY, ESQ.
General Counsel
Federal Communications Commission
Attorney for Respondent, The
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20054

THOMAS E. KAUPER, ESQ.
Assistant Attorney General,
Department of Justice, Antitrust Division
Attorney for Respondent,
United States of America
Washington, D.C. 20530

WILKINSON, CRAGUN & BARKER
Attorneys for Intervenor,
State of Hawaii
1735 New York Avenue, N.W.
Washington, D.C. 20006

JOEL YOHALEM, ESQ.
c/o Western Union Telegraph Co.
1828 L Street, N.W.
Washington, D.C. 20036

RICHARD C. HOSTETLER, ESQ.
Vice President and General Counsel
The Western Union Telegraph Company
One Lake Street
Upper Saddle River, N.J. 07458

at the addresses designated by said attorneys or the parties by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Andrew J. Trubin
Andrew J. Trubin

Sworn to before me this
30th day of April, 1976.

Henry J. Silberberg
Notary Public

HENRY J. SILBERBERG
Notary Public, State of New York
No. 3664710
Qualified in New York County
Commission Expires March 30, 1977

Docket No. 75-4132

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

-against-

THE FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

-and-

THE WESTERN UNION TELEGRAPH COMPANY, et al

Intervenors.

AFFIDAVITS OF SERVICE

STROOCK & STROOCK & LAVAN

Attorneys for Petitioner

61 BROADWAY
BOROUGH OF MANHATTAN
NEW YORK, N. Y. 10006
(212) 425-5200